

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
REPLY BRIEF**



74-1806

UNITED STATES COURTS OF APPEAL  
FOR THE SECOND CIRCUIT  
NO. 74-1806

EXXON CORPORATION,

Plaintiff-Appellant,  
-against-

THE CITY OF NEW YORK; ENVIRONMENTAL  
PROTECTION ADMINISTRATION OF THE CITY  
OF NEW YORK; and ADMINISTRATOR OF THE  
ENVIRONMENTAL PROTECTION ADMINISTRATION  
OF THE CITY OF NEW YORK,

Defendants-Appellees.

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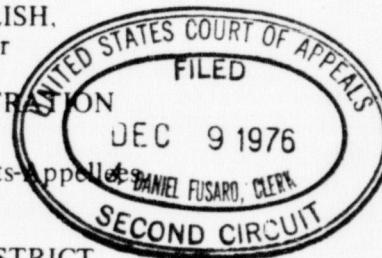
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GETTY OIL CO. (Eastern Operations), INC.,  
GULF OIL CO. - U.S.; MOBIL OIL CORPORATION;  
and SUN OIL COMPANY OF PENNSYLVANIA,

Plaintiffs-Appellants,  
-against-

THE CITY OF NEW YORK; HERBERT ELISH,  
Environmental Protection Administrator  
of the City of New York; and the  
ENVIRONMENTAL PROTECTION ADMINISTRATION  
OF THE CITY OF NEW YORK,

Defendants-Appellees.



ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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REPLY BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Appellants submit this Reply Brief pursuant to the Order of this Court dated November 22, 1976. The Court is respectfully referred to the

Brief of Appellants filed November 23, 1976 for a statement of the underlying facts and the Proceedings below. No part of the Argument set forth in the Brief of Appellants is repeated herein.

#### SUMMARY OF REPLY ARGUMENT

The Brief of Defendants Appellees (hereinafter also referred to as "the City") makes two fundamental errors in attempting to establish a new "requirement" of "applicability" to be met, they argue, before federal preemption occurs. First, the City glosses over in a footnote (p. 16) the substantial controls currently "applicable" under the federal lead regulations. Second, the City asserts that preemption only occurs when a particular lead level must be met. This view is contradicted by the text and legislative history of the statute. The City's view distorts the meaning of effectiveness and has never been articulated or espoused by any court.

#### REPLY ARGUMENT

- A. LOW-LEAD GASOLINE PRODUCTION, SYSTEMATIC REFINERY MODIFICATIONS, AND REPORTS RELATING THERETO ARE REQUIRED BY FEDERAL REGULATIONS "APPLICABLE" NOW.

The gasoline lead content sections of the C.F.R. impose substantial current burdens on the petro-

leum industry. In light of these obligations it is clear that currently applicable controls exist.

First, refiners and marketers of petroleum products must measure lead levels by use of procedures prescribed by the federal E.P.A. 40 C.F.R. § 80.3.

Second, petroleum marketers must permit representatives of the federal E.P.A. to enter their premises, to make inspections, take samples and conduct tests to determine compliance with the lead regulations. 40 C.F.R. § 80.4.

Third, no distributor or retailer may sell gasoline labelled "unleaded" unless it meets the federal definition thereof. 40 C.F.R. § 80.21.

Fourth, no retailer may place leaded gasoline in an automobile gasoline tank labelled "unleaded gasoline only". 40 C.F.R. § 80.22(a).

Fifth, every owner, operator or person controlling a filling station over a minimum volume must offer one grade of unleaded gasoline for sale. 40 C.F.R. § 80.22(b).

Sixth, retailers must display prominent signs concerning unleaded gasoline. 40 C.F.R. § 80.22(d).

Seventh, retailers must utilize special nozzles on pumps for sale of unleaded gasoline. 40 C.F.R. § 80.22(f).

Eighth, automobile manufacturers must construct and label gasoline tanks to accommodate unleaded gasoline. 40 C.F.R. § 80.24.

Ninth, each refiner must submit quarterly reports to the federal E.P.A. detailing (i) the total grams of lead additive in inventory on the first day of the period, (ii) the total grams of lead received during the period, (iii) the total grams of lead in inventory at the close of the period, (iv) the total gallons of gasoline produced by the refinery during the period, and (v) the average grams per gallon of gasoline produced during the period. Such reports must be filed within 15 days after close of the quarter on forms specified by the federal E.P.A. 40 C.F.R. § 80.20(a)(3).

Tenth, every lead additive manufacturer must file quarterly reports detailing the total grams of lead shipped to each refiner. Such reports are due 15 days after the close of a quarter and must be on forms prescribed by the federal E.P.A. 40 C.F.R. § 80.25.

Each of the foregoing regulations must be met now. Other reporting requirements are imminent. Every refiner must prepare and submit no later than January 31, 1977 a comprehensive schedule of procedures being undertaken to assure the refiner's ability to meet the January 1, 1978 level of 0.8 g/gal. and the October 1, 1979 level of 0.5 g/gal. Every refiner must demonstrate that it has taken and is continuing to take sufficient action to achieve these levels, including "procuring and installing equipment or entering into process and exchange agreements, or both." 40 C.F.R. § 80.20(a)(4)(ii). The schedules must set forth the sequence and dates of all key events in the construction process, including completion of plans and engineering drawings, ordering and receipt of equipment, signing of construction and other contracts, commencement and completion of various phases of work, completion of testing and other similar dates. 40 C.F.R. § 80.20(a)(4)(iii). A refiner must notify the federal E.P.A. within 10 days of any failure to meet any scheduled stage of compliance. 40 C.F.R. § 80.20(a)(4)(vii).

If a refiner intends to meet the January 1, 1978 or October 1, 1979 lead phase-downs by changing its output levels or product mix, it must notify the federal E.P.A. by December 31, 1976 and provide information concerning production levels. 40 C.F.R. § 80.20 (a)(4)(v).

In general, the federal E.P.A. may at any time require reports from refiners, copies of contracts and any other evidence of progress requested by the Administrator on 30-days notice. 40 C.F.R. § 80.20(a)(4)(vi).

Obviously, current reports are required under several of the foregoing provisions. Current marketing and refining patterns are required under others to meet the current lead free requirement (one grade, nationwide). Finally, current planning, report and schedule preparation\* and actual conversion of refinery operation (entailing engineering and actual physical changes) are required by others to meet the January 1, 1978 and October 1, 1979 lead levels. And, of course, refiners may not produce gasoline with an average lead content per gallon exceeding 0.8 g/gal. after January 1, 1978 and 0.5 g/gal. after October 1, 1979. 40 C.F.R. § 80.20(a)(1). All of these controls are backed by penalties, including a "\$10,000 civil penalty for each and every day" of noncompliance.

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\* Certain statutes which involve only reporting requirements have been held to preempt state laws. See Azzaro v. Harnett, 414 F.Supp. 473 (S.D.N.Y. 1976). An express preemption of inconsistent state requirements caused the court to invalidate certain state laws in Retail Credit Co. v. Dade County, Florida, 393 F.Supp. 577, 584 (S.D. Fla. 1975) (Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681t). Certain reports of employers in garnishment proceedings required by federal forms promulgated under the Consumer Credit Protection Act, 15 U.S.C. § 1673(a) and (c) were held to preempt state laws in Hodgson v. Cleveland Municipal Court, 326 F.Supp. 419, 437 (N.D. Ohio 1971).

Of course, there is a lead content limitation which must currently be met, i.e., one grade of "lead free" (0.05 g/gal.) gasoline throughout the country. 40 C.F.R. § 80.22. See Addendum A to Brief of Appellants.

40 C.F.R. § 80.5. In the face of this panoply of burdens being enforced now, to argue that a federal lead control is not "applicable" makes no sense.

B. THERE IS NO FURTHER "APPLICABILITY" REQUIRED TO ESTABLISH PREEMPTION.

1. The Text of § 1857f-6(c)  
Belies The City's Reading.

The phrase upon which the City rests its claim that preemption must await the date upon which a specific lead level must be met is as follows: "if the Administrator has prescribed ... a control or prohibition applicable to such fuel or fuel additive."

42 U.S.C. § 1857f-6c(c)(4)(A).

It is obvious that "applicable" was used in this section to mean "relating to". It would have been simple for Congress to state that preemption only occurs "if the Administrator has prescribed a control or prohibition setting a current maximum lead content". Congress did not.

A second reason why it is clear from the face of the statute that the City is wrong is the absence of any focus therein on specific fuel content levels. The statute does not mention any requirement that federal regulation must be a control over grams per gallon. Rather, the federal Administrator is authorized

to regulate "the manufacture, introduction into commerce, offering for sale, or sale" of a fuel additive. 42 U.S.C. § 1857f-6c(c)(1). Controls on the manufacture of leaded gasoline are the essence of a large portion of the present regulations. Such control has in part been achieved by detailed requirements related to but not containing specific lead reduction levels until January 1, 1978.

2. The Legislative History Demonstrates That Prescription is Sufficient To Trigger Preemption.

An express paragraph in the Conference Committee Report on the final version of the Clean Air Act Amendments of 1970 makes it unmistakably clear that nothing more than federal prescription of a regulation is required to establish the exclusion of state controls contemplated by Congress. The portions of the Report relating to § 211 (now 42 U.S.C. § 1857f-6c) are set forth in Addendum K to the Brief of Appellants filed November 23, 1976. The penultimate paragraph thereof contains an expression of the congressional intent: "No state may prescribe or enforce controls or prohibitions respecting any fuel or additive unless they are identical to those prescribed by the Federal Government." Conf. Rep. No. 91-1783, Dec. 17, 1970 (emphasis added); 1970 U.S. Code Cong.

and Admin. News, 5385-86. See Addendum K to Brief of Appellants herein. Two factors are of significance concerning this clear statement of intention. First, the federal regulation simply must be "respecting" a particular fuel additive, confirming the common sense reading of the statute set forth in the preceding section of this brief. A control "applicable" to such fuel additive simply means relating to it, not "setting current gram limitations thereon" as the City claims. Second, the preemption occurs upon the prescription of a regulation by the federal Administrator, and prescription alone. The congressional conferees, who shaped the preemption language from divergent Senate and House drafts, do not report that preemption occurs when a specific step-down in lead content is "applicable" but rather when a control has been prescribed by the Federal Government.

3. No Case Has Ever Used the Term "Applicability" in the Way the City Does.

Case support for the City's artful reading of "applicable" is conspicuously absent. The Brief of Defendants-Appellees cites absolutely no authority for this idea. Exhaustive review by Appellants has turned up no instance of a similar construction. The simple answer is that the purported construction is sheer sophistry.

## CONCLUSION

Having argued originally that two sets of regulations were required, having switched to a claim that the present regulations were not "effective", then having switched to a claim that the regulations were void ab initio, and now arriving at the claim that the regulations are not applicable to lead, the City's arguments must be rejected.\*

There can be no doubt that Congress may invoke the Supremacy Clause to the extent it sees fit and displace all state regulations in the field

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\* The City's nondegradation plea (p. 24) reflects a misapprehension of the breadth of the Clean Air Act's focus. As the court noted in N.R.D.C. v. E.P.A., 489 F.2d 390, 408-09 (5th Cir. 1974), rev'd and remanded on other grounds, 421 U.S. 60 (1975), the goal of nondegradation means that the solution of one area's problems will not be at the expense of the environment of other sections.

"The use of [tall smokestack] dispersion techniques is at odds with the nondegradation policy. Dispersion enhancement techniques operate by keeping pollutants out of areas of high pollutant concentration, and dispersing them to lower concentration areas; their objective is to reduce concentrations in high-concentration areas. Inevitably, however, the pollutants emitted into the atmosphere must end up somewhere; and the atmosphere at their destination, wherever that may be, will be degraded, in violation of the congressional policy."

New York City wants to do the same thing with lead-free gasoline. At a time when there is not enough to go around, (see 41 Fed. Reg. 42675, Brief of Appellants, Addendum F) the City wants all gas used in its territory to be lead free, taking supplies away from the rest of the country. See Appendix pages 57a-64a.

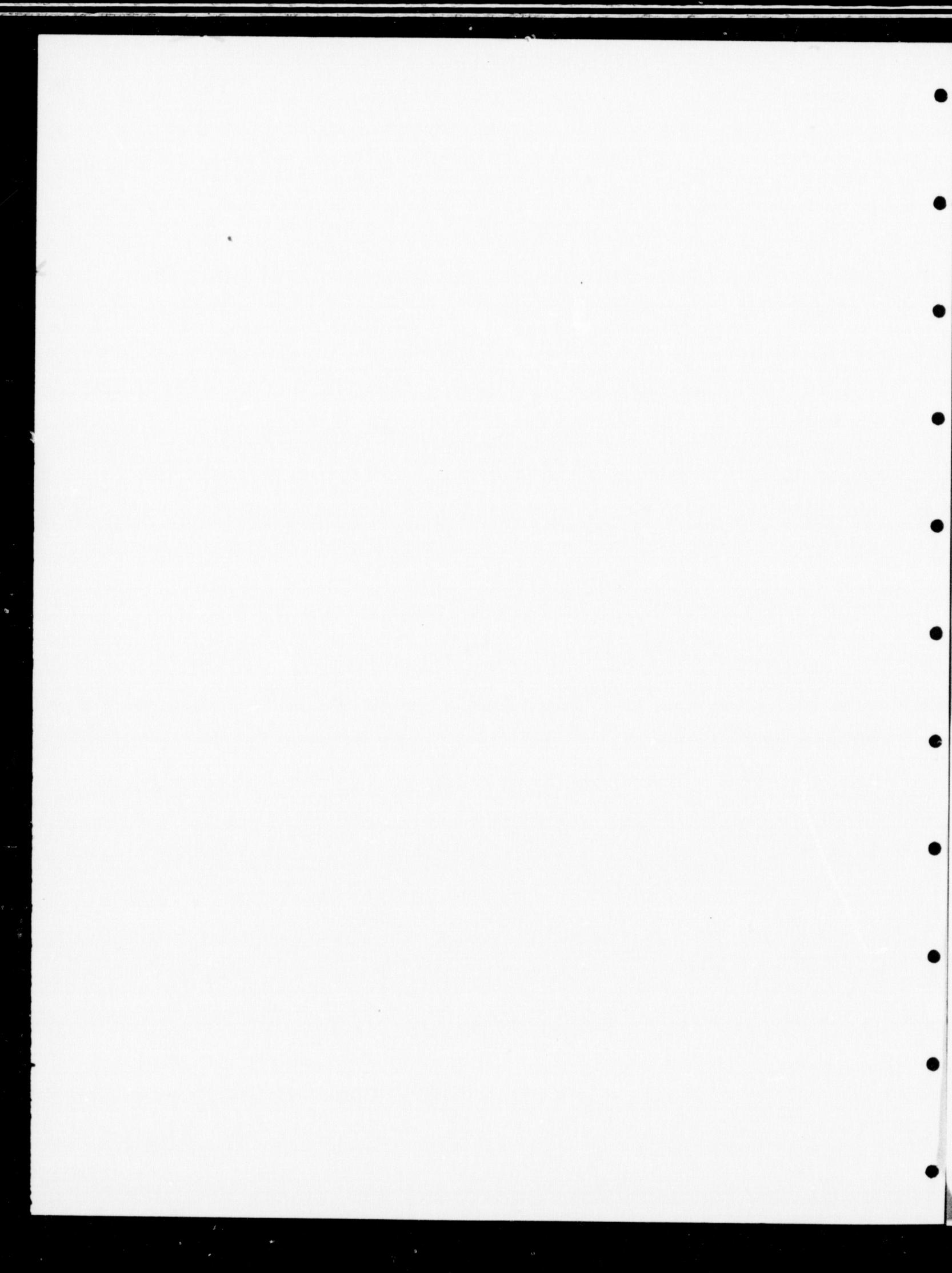
of the federal enactment. Retail Clerks Int'l. Ass'n v. Schermerhorn, 375 U.S. 96 (1963). In determining the preemptive effect of federal legislation, the intent of Congress must always control.

Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1947).

When Congress specifically addresses the issue of state regulation, there is an "overwhelming expression of congressional intention to preempt state law."\* National Association of Regulatory

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\* The City relies on Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963) in arguing that there is no inherent conflict between federal and state regulations in this case. Resort to the issue of "conflicts" is only necessary where there is no express preemption and the court is forced to infer an intention to preempt from the conflicts. See authorities cited in the Brief of Appellants at pages 21-30. Florida Lime was not a case where an express preemption provision was to be found in the statute. While the express preemption language of the Clean Air Act Amendments resolves this issue, we note in passing that more stringent state regulation is a conflict prohibited under the Supremacy Clause. See Townsend v. Swank, 404 U.S. 282 (1971) (Stiffer welfare qualification rules preempted); Northern States Power Co. v. Minnesota, 447 F. 2d 1143, 1145, 1146 (8th Cir. 1971) aff'd, 405 U.S. 1035 (1972) (More stringent radioactive waste regulations pre-empted). In Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n, 382 U.S. 181, 187, 193 (1965) the Court said that one ground rule for pre-emption decisions was that "the greatest threat against which the [preemption] doctrine guards [is] a state's prohibition of activity that the [federal] Act indicates must go unhampered." See Tyree v. N.L.R.B., 287 F. Supp. 589 (D.Alaska 1968). And in Campbell v. Hussey, 368 U.S. 297 (1961), the Court illustrated that more restrictive state laws cannot stand. There the complainant was able to comply with the federal law by attaching to his tobacco a blue ticket to indicate its characteristics (quality, color, length). The Georgia Tobacco Identification Act required in addition the affixing of a white ticket to show geographic origin. While compliance with both laws was physically possible, the state law was invalidated.



Utility Commissioners v. Coleman, 542 F.2d 11,  
14 (3d Cir. 1976). The clear mandate for federal  
preemption, expressed in the very body of the Clean  
Air Act Amendments of 1970, must be recognized and  
effectuated.

Respectfully submitted,

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